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AL-QAEDA AND THE LAW OF WAR

by
Mark Weisburd*

Nearly since September 11 itself, the legal community has been debating the legal status of al-Qaeda members—criminals versus combatants of war. Though there are many lenses through which one can view this issue, this Article examines the question in terms of individual rights of al-Qaeda members under international law. The author puts the issue in context by first discussing the significance of the label—the distinction in treatment between criminal suspects and prisoners of war. Then, the Article analyzes al-Qaeda and its operations to determine where its members might fall on the continuum from criminal to combatant. Ultimately, the Article suggests that, at least when considering their personal rights under international law, al-Qaeda members should be considered combatants of war, rather than criminals. However, the nature of al-Qaeda makes it difficult to apply international humanitarian law to the group, with interesting implications for the future of this area of law.

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I. INTRODUCTION

Beginning almost on September 11, 2001, itself, there has been considerable controversy as to how the legal system ought to deal with members of al-Qaeda, other than those captured on the battlefield fighting alongside the Taliban in Afghanistan or with insurgents in Iraq. That is, what legal standard should be applied to members of that organization who are operating away from any zone of open combat, but are believed to be engaged in activities with significant connections to planned acts of violence?

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These issues may touch on a number of areas of law. To the extent the question regards the authority of the U.S. government to take certain actions within American territory, it would hardly be surprising if the Constitution imposed limits, whatever international law may say about the matter. If the United States acts in the territory of some other state, questions of respect for that state's sovereignty obviously arise. Finally, one may focus on the rights personal to members of al-Qaeda and created by international law. This Article addresses the last of these subjects.

With respect to that issue, some have argued that al-Qaeda members should simply be treated as criminals.¹ Others have argued that it is more appropriate to see actions taken to deal with such groups as war. While no one, as far as I know, has argued that members of groups like al-Qaeda are entitled to treatment as prisoners of war, the war analogy would suggest that international humanitarian law rather than the law of criminal procedure would provide the starting point for any discussion of their treatment.²

More turns on this issue than a matter of syntax. The label applied to members of al-Qaeda-like groups determines, among other things, the circumstances in which deadly force may be used against them and in which they may be taken prisoner, the duration of any confinement to which they are subjected, and the rules which must be followed when such persons are interrogated.³

This Article will seek to explain this problem and suggest a resolution. It will first provide more details as to the differences in treatment which depend on the label applied to actions taken against al-Qaeda. It will then seek to explain the differences between the treatment accorded combatants in war and that applied to criminal suspects in the United States.⁴ The Article will go on to describe the nature of al-Qaeda and its operations and, in light of that description, will attempt to determine where the actions of al-Qaeda fall on a continuum between crime and war and the implications of that conclusion for considerations of the legal status of members of the group. The penultimate section of the Article will suggest that the problems al-Qaeda presents raise doubts

¹ See, e.g., Anthony Dworkin, *Military Necessity and Due Process: The Place of Human Rights in the War on Terror*, in *NEW WARS, NEW LAWS?* 53, 54 (David Wippman & Matthew Evangelista eds., 2005).

² See, e.g., William K. Lietzau, *Combating Terrorism: The Consequences of Moving from Law Enforcement to War*, in *NEW WARS, NEW LAWS?*, *supra* note 1, at 31.

³ See discussion *infra* notes 5–20.

⁴ For the sake of simplicity and in light of the intended audience, the discussion of criminal procedure in this Article focuses on procedural rights guaranteed by the Constitution of the United States as a proxy for procedural rights al-Qaeda members would enjoy by virtue of the International Covenant on Civil and Political Rights arts. 9, 10, 14, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] since the guarantees are similar and there is considerably more authoritative exposition of the U.S. Constitution than there is of the ICCPR.

about whether some of the basic assumptions of international humanitarian law can be applied in the efforts to reduce or eliminate the threat posed by such organizations. The conclusion will draw all this together and suggest further reasons for concern.

II. WHY THE LABEL MATTERS

When Richard Reid, the so-called “shoe bomber,” was sentenced upon his conviction for his attempt to blow up an airplane in flight, the trial judge was at pains to insist that Reid was a criminal, not a soldier.⁵ “[T]o call you a soldier,” Judge Young said, “gives you far too much stature.”⁶

The distinction Judge Young drew is hardly uncommon. Soldiers are considered respectable; criminals are not. It is, however, not always soldiers who are favored if rules regarding dealing with criminal violence are compared to the provisions of the law of war. As will be seen, even lawful combatants⁷ in an armed conflict are entitled to much less protection than are criminal suspects in the United States.

At the outset, one problem should be noted. Treaties central to the law of war declare themselves applicable in cases of “armed conflict.”⁸ There is some controversy as to whether the actions of al-Qaeda can properly be classified as armed conflict.⁹ However, even if it would be a mistake to assert that international humanitarian law as currently structured squarely applies to the operations of al-Qaeda outside zones of open conflict, it does not follow that concepts drawn from that body of

⁵ Michael Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in NEW WARS, NEW LAWS?, *supra* note 1, at 75.

⁶ *Id.*

⁷ For ease of reference, this Article will use the label “combatants” to refer to all persons who take part in hostilities which are part of an “armed conflict” in the sense of the law of war. Those combatants who would qualify as prisoners of war if captured will be referred to as “lawful combatants.”

⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1, *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

⁹ See CHRISTOPHER GREENWOOD, *War, Terrorism and International Law*, in ESSAYS ON WAR IN INTERNATIONAL LAW 409, 430 (2006) [hereinafter GREENWOOD, *War, Terrorism and International Law*].

law cannot be useful in considering how al-Qaeda members ought to be treated.

With this caveat, we can return to explaining what differences in the law regarding treatment of al-Qaeda members flow from the determination as to whether their activities should be considered essentially criminal or, instead, better analogized to war. Most fundamentally, the two bodies of law differ regarding the legality of killing. Protocol I to the 1949 Geneva Conventions provides, "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."¹⁰ In other words, lawful combatants on one side of an armed conflict may lawfully kill combatants on the other side.

In contrast, there are serious restrictions in American law on the circumstances in which officials may use force against a criminal suspect. According to *Tennessee v. Garner*:¹¹

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. . . . Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. . . .

. . . Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.¹²

In short, combatants may be killed by their adversaries simply because they are combatants; criminals may not be killed by law enforcement personnel unless relatively specific and fairly uncommon conditions are satisfied.

A second distinction between the law relating to criminal violence and the law of war relates to the circumstances in which a person may be

¹⁰ Protocol I, *supra* note 8, art. 43(2). The United States is not a party to Protocol I, but there is reason to believe that article 43(2) is, in this respect, considered to state customary international law. See GREENWOOD, *War, Terrorism and International Law*, *supra* note 9; CHRISTOPHER GREENWOOD, *The Customary Law Status of the 1977 Protocols*, in *ESSAYS ON WAR IN INTERNATIONAL LAW*, *supra* note 9, at 179, 192 [hereinafter GREENWOOD, *1977 Protocols*]; 1 HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 11 (1986).

¹¹ 471 U.S. 1 (1985).

¹² *Id.* at 11–12.

detained. During hostilities, persons entitled to prisoner of war status assume that status “from the time they fall into the power of the enemy.”¹³ That is, lawful combatants who find themselves in control of opposing combatants are not obliged to follow any procedural steps in order to impose prisoner of war status on those of their captives who fall into one of the categories of combatants entitled to prisoner of war status; capture itself suffices. Further, if persons entitled to prisoner of war status may be taken captive without their captors following any particular procedural steps, it must follow that persons taking part in hostilities but not entitled to prisoner of war status enjoy no greater level of protection.

In American law, however, there are strict limitations on the right of the authorities to detain someone against his will. An individual may be arrested pursuant to an arrest warrant, but warrants may issue only if probable cause for arrest is demonstrated.¹⁴ If a law enforcement officer seeks to make an arrest without a warrant, he must have probable cause for the arrest.¹⁵ Further, if an arrest is made without a warrant, a judge must determine that probable cause exists to hold the arrestee, normally within forty-eight hours of the arrest.¹⁶

Further, prisoners of war may be detained for the duration of hostilities between their captor and the group for which they fought.¹⁷ Necessarily, the duration of their captivity cannot be determined at the time of their capture. In contrast, persons convicted of crimes are obliged to serve for a fixed period with, in many cases, the possibility of early release, for example, on parole.

Finally, the situations of criminal suspects and prisoners of war also differ regarding limits placed on interrogation after detention. According to the law of war, “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.”¹⁸ However, that body of law does

¹³ Geneva III, *supra* note 8, art. 5.

¹⁴ U.S. CONST. amend. IV; *see* *Giordenello v. United States*, 357 U.S. 480 (1958).

¹⁵ *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

¹⁶ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

¹⁷ Geneva III, *supra* note 8, art. 118.

¹⁸ Geneva III, *supra* note 8, art. 17. Not all persons liable to capture are entitled to treatment as prisoners of war. Protocol I, *supra* note 8, arts. 43, 44, 51(3), 75(1). Persons subject to the law of armed conflict who are captured but are not entitled to prisoner of war status are not, however, completely unprotected; their captors are forbidden to resort to:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular: (i) Murder; (ii) Torture of all kinds, whether physical or mental; (iii) Corporal punishment; and (iv) [Mutilation]; (b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault; (c) The taking of hostages; (d) Collective punishments; and (e) Threats to commit any of the foregoing acts.

not forbid requiring prisoners of war to submit to interrogation, and if prisoners of war cannot avoid interrogation, one must assume that the same is true for captured combatants not entitled to prisoner of war status. In the law of the United States, the police are also forbidden to coerce criminal suspects into confessing.¹⁹ But in addition to this right, a criminal suspect has the right to remain silent in the face of interrogation and to be informed of this right by law enforcement officers. He must also be informed that, if he chooses to speak, whatever he says may be used against him in court and that he has a right to an attorney—at government expense if he cannot pay for his own counsel. The suspect has the right to end the interrogation at any time, and the interrogation must end if the suspect indicates a desire for an attorney until the suspect has had an opportunity to consult his attorney.

In summary, combatants face disadvantages violent criminals do not. Combatants may be shot on sight by their opponents, detained without any sort of process, and questioned at the discretion of their captors and without the assistance of anyone. Combatants are also unable to know the length of their captivity, since that depends on events beyond the control of their captors.

If dealing with al-Qaeda is treated as a criminal matter, then, persons suspected of being members of that organization would be entitled to considerably gentler treatment than would combatants on a battlefield, at least before the al-Qaeda members were convicted of a crime.²⁰ But why

Id. art. 75(2). The United States is not a party to Protocol I, but apparently regards article 75 as declaratory of customary international law. GREENWOOD, 1977 *Protocols*, *supra* note 10, at 188–89.

¹⁹ See, e.g., *Arizona v. Fulminante*, 499 U.S. 279 (1991).

²⁰ Of course, if an al-Qaeda member is convicted and imprisoned, the conditions in which he is held may be grim. Consider the following description—taken from *Wilkinson v. Austin*, 545 U.S. 209 (2005)—of the nature of the confinement Ohio imposed upon its most troublesome prisoners, including some placed in that category solely because of the nature of their offense:

[A]lmost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP [Ohio State Penitentiary] is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.

Aside from the severity of the conditions, placement at OSP is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once

should combatants in war be treated differently from criminals? It is to that question the discussion now turns.

III. CRIME, WAR, AND VIOLENCE

As just discussed, there is a significant difference between the treatment that the U.S. government would normally accord criminals and that permitted by the international law of war. This section of the Article will attempt to explain that difference.

To take criminal violence first, some generalizations regarding that phenomenon are easy to defend. Preliminarily, I will define the term, “criminal violence” as violence perpetrated by relatively small groups of individuals for private ends. Their potential victims include essentially everyone. While the consequences of any individual crime can be devastating for the victim, the material effects on society at large are generally limited (though it is of course true that a perception that violent crime has become relatively common can lead to an increase in anxiety among members of the public). Further, it is reasonable to assume that perpetrators are relatively highly motivated to engage in criminal violence, since they do so despite awareness of potential negative consequences, e.g., the risk of what may be severe punishment and the possibility of serious reputational harm.

Inter-state war as waged by states differs from crime, first of all, in the connection between the individuals who actually carry out the violence and the entity which sets the violence in motion. With the exception of a relatively small group of decision-makers, individuals participate as agents, not as initiators. Individual participants understand, further, that war is not intended to and almost surely will not advance their individual interests except to the extent that they identify with the interests of the entities they serve.²¹ On the contrary, the aspect of war’s impact on participants which is likely to strike them most forcibly is the risk of death or permanent injury. Also unlike criminals, participants in war are not generally considered by their compatriots to be bad people because of their participation in war; indeed, they are likely to be seen as praiseworthy for undergoing the risks of war. Further, individuals take part in war, not as free agents, but as part of a military organization; as members of an organization, it is possible to subject those individuals to

assigned there. Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.

Id. at 214–15 (citation omitted). Placement in this prison was preceded by a thorough process aimed at determining the propriety of the placement, in which the inmate involved was allowed to participate. If he was confined in this prison, his status was reviewed after thirty days, and at least annually thereafter. *Id.* at 216–17.

²¹ Of course, the statement in the text can apply only to conventional war as currently waged; in the seventeenth century, when looting and rape were seen as perquisites of persons engaging in war, the statement in the text would have been false.

strict discipline and to ensure that they obey orders that their superiors issue. In particular, it may be assumed that if those superiors order their subordinates to cease fighting, those orders will be obeyed. There is very seldom any reason to assume that individual members of a state's military have so deep a personal investment in a war that they will insist on continuing hostilities after their government has terminated hostilities.

War also differs from crime in the risks it poses to entities engaging in it. A state that resorts to war does so to violently coerce its opponents to conform to its desires, desires which may extend to the absolute subjugation of the target of a war. The risks war poses for states are great enough that they will expend extraordinary quantities of resources and impose significant hardships on their citizens in order to defeat their enemies. Under conditions of modern war, this means that casualties among members of the military can be very high. Further, since legitimate targets in inter-state war include militarily-related industries and transportation links, and since industries and transportation links are often found in populated areas and serve civilian markets as well as military customers, war has the potential to cause great loss of civilian life and destruction of economic infrastructure as well.²² That is, being engaged in war means that a state at least faces serious threats of damage to life and property on a scale far exceeding that associated with individual criminal enterprises; further, at the worst, war threatens a state and its population with subjugation.

These factors, taken together, suggest explanations for the different ways in which states employ their security forces to deal, respectively, with crime and with war. If criminals act in small groups and there is little limit on their targets, it would be very difficult to use security forces to prevent crime; essentially, it would be necessary to use a very large proportion of the population to keep those persons outside the security forces under constant surveillance, and to permit the security forces to interfere in any activity which aroused their suspicions. Such a system would be impossibly expensive, relative to the expected harm from any particular criminal activity, and would require a degree of control of the population that could only be called totalitarian. Since, in the United States, such a policy could only be applied with express or implicit popular consent, it would not be applied unless a majority of the population was sufficiently concerned about crime to accept the restrictions on their own freedom such a policy would necessarily entail. To date, at least, Americans have not shown themselves sufficiently concerned about crime to acquiesce in such a system.

Instead of an intensively preventive approach, American governments typically seek to deter crime by patrolling, by arresting persons who are believed to have committed crime, and by punishing

²² RUPERT SMITH, *THE UTILITY OF FORCE* 136–37 (2005). This work is both enlightening and thought-provoking for anyone seeking to address the issues to which this Article is directed.

those proven to have committed crime. That is, law enforcement authorities take a primarily ex post approach to crime, devoting much of their activity to assigning responsibility and inflicting penalties for past crime. Americans are sufficiently aware of the risks to individual freedom presented by permitting the government to seize and detain individuals that they have accepted strict limitations on those authorities, in order to ensure all criminal suspects are treated fairly. The authorities are forbidden to arrest without evidence, are limited in the sort of evidence they are permitted to acquire and in their evidence-gathering methods, required to present a high degree of proof to establish the guilt of the defendant, and are forbidden to punish the defendant until he is convicted by a court, and then only to the extent the law permits and the court determines. Punishment is inflicted on the basis of individual guilt and justified as deterrence; as removing from society, at least temporarily, a person whose choice to commit a criminal act despite the various costs of doing so suggests that the person may choose to commit other such acts; and, as far as some people are concerned, as justly punishing bad behavior.

War presents a much different situation. Most significantly, war either threatens the state with losses many orders of magnitude greater than those caused by crime or offers the state opportunities to make gains so great as to exceed the expected costs of war, as large as those costs necessarily are. It is therefore important for the state to take positive action either to defend itself or to attack, as the case may be, in order either to avoid the threatened future harm or ensure the possible future gain. War, that is, must have an ex ante focus: it must be an effort to actively shape the future rather than merely to respond to events in the past.

In line with this reasoning, belligerent states attempt to prevent their adversaries from causing future harm by destroying their military forces; obviously, killing or capturing the members of an adversary's forces will destroy those forces. If one could not kill members of the opposing military on sight, or capture members of enemy armed forces without going through time-consuming procedural steps, the delay imposed on military operations could be significant and the risks of defeat greatly increased. Permitting legal assistance to captured combatants in their interrogations could prevent the gathering of information essential to forestalling enemy action. On the other hand, lawful combatants in war are not typically personally dangerous; there is no reason to assume that such persons would have any reason to continue efforts to injure the state holding them captive once the authorities they served have agreed to stop fighting, and therefore their captors have no reason to detain them beyond the end of hostilities. Since their service in the armed forces of their state is by no means criminal, prisoners of war are not guilty of anything simply by virtue of their military service—as *The Manual of the Law of Armed Conflict* of the United Kingdom's Ministry of Defence puts it,

enemy prisoners “were simply doing their duty”²³—and there is no reason to treat them harshly.

There is one other factor relevant to a difference between the treatment of criminals and that accorded combatants in war: the difference in cost to the citizenry of the war-making state. That state’s citizens may reasonably assume that the state’s authority to apply harsh measures to members of an adversary’s armed forces will not be taken as authority to apply such measures to the citizenry; that is, this situation does not pose the risk to citizens presented by grants of broad authority to treat criminals harshly.²⁴

In light of these differences, the distinctions in treatment between criminals and combatants in war make some sense. Given the focus on fairness and on limiting governmental interference with the great majority of citizens, one can understand a decision to limit the right of the police to use force, to demand that the government demonstrate why someone should be arrested, and to regulate interrogation—with all such activities, furthermore, focused on the past. Because criminals are individually dangerous, however, it makes sense to subject them to a punitive detention regime. Given the great risks war poses to a community’s future and the lack of individual dangerousness of the typical member of an enemy’s armed forces, it likewise makes sense that members of opposing forces will be treated with great harshness on the battlefield, but with relative moderation after surrender.

But if the distinction between the treatment of criminals and that of members of opposing forces in war makes sense at a general level, it remains to be considered how operations against al-Qaeda should be characterized. Before that is possible, however, it is necessary to consider how al-Qaeda functions. The next Part addresses this topic.

IV. THE NATURE OF AL-QAEDA

What, then, are the characteristics of al-Qaeda that are relevant, beyond the obvious facts that it uses violence and is not a government?

First, its objectives are not limited to affecting any particular territory or very specific group. It does not exercise what could be called government-like control over any group or area, nor, apparently, does it seek to do so. Likewise, it does not rely on the approval of any such group to legitimate its actions. Of course, it purports to focus on all Muslims and all territory ever subject to a caliphate, but so broad a focus is no focus at all. These characteristics distinguish al-Qaeda from groups such as Hezbollah, Hamas, and the I.R.A.—all of which (i) are oriented to

²³ U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT 141 (2004) [hereinafter UK Manual].

²⁴ Further, moderate treatment of enemy prisoners may be attractive as inducing the enemy to treat moderately one’s fellow citizens who become prisoners—or maybe not. See Eric Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT’L L. 423, 429 (2005).

what they claim to be the interests of particular groups in particular places; (ii) seek to exercise power over those groups; and (iii) rely on the support of those groups.

Second, al-Qaeda has, since at least 1996, made clear that it considers itself at war with the United States. Furthermore, Osama bin Laden has called for attacks on American civilians, not just on elements of the U.S. government, justifying such attacks by noting that American taxpayers fund the U.S. military and the U.S. government activities which al-Qaeda considers so objectionable.

Third, since al-Qaeda uses violence for such purposes, it is unlikely that its members would think of themselves as having “won” while Muslims continue to live in separate states not governed according to the letter of the Holy Qu’ran, and while they perceive the United States as exercising hegemoniacal control over the world. Al-Qaeda can thus be distinguished from criminal groups *strictu sensu*, whose goals are usually assumed to be focused on material gain for group members.

Fourth, al-Qaeda has shown itself capable of inflicting violence on a scale more commonly associated with military operations than with activities of groups neither formed by governments nor aimed at seizing control of a government, such as the Viet Cong. Equally important, al-Qaeda has made clear its desire to acquire weapons that would permit it to inflict even greater levels of destruction.²⁵

Fifth, although there is evidence that thousands of individuals may have passed through its training camps, and its current membership is estimated at 50,000,²⁶ al-Qaeda members tend to operate in small groups and to attack undefended civilian targets. Although its members apparently took part in conventional fighting at the time of the American invasion of Afghanistan, as a general matter it lacks the capacity to engage in conventional combat or to organize military units even of moderate size. Relatedly, the number of attacks it has carried out is relatively small. Al-Qaeda itself is credited with 32 attacks since its formation in the late 1980s, killing approximately 3,500 people and injuring approximately 8,900 more. Groups labeling themselves “al-Qaeda” have been responsible for an additional 34 attacks, excluding those carried out in Iraq; these attacks have killed 46 people and injured 85.²⁷

The small size of the groups which carry out al-Qaeda operations also facilitates the covert entry by group members into the territory of the

²⁵ The foregoing description of al-Qaeda is culled from Dominic D. McAlea, *Post-Westphalian Crime*, in NEW WARS, NEW LAWS?, *supra* note 1, at 111, 116–21, and PERMANENT SELECT COMM. ON INTELLIGENCE, AL-QAEDA: THE MANY FACES OF AN ISLAMIST EXTREMIST THREAT, H.R. REP. NO. 109-615, at 6–10 (2006).

²⁶ See Memorial Institute for the Prevention of Terrorism (MIPT), Terrorism Knowledge Base, Al-Qaeda, <http://www.tkb.org/Group.jsp?groupID=6>.

²⁷ See MIPT, Terrorism Knowledge Base, Terrorist Incident Reports, <http://www.tkb.org/IncidentGroupModule.jsp> [hereinafter MIPT/TKB].

state al-Qaeda wishes to target. That is, a state must take into account the serious possibility that al-Qaeda operatives within its borders will be a main source of any violence perpetrated against it.

Nor is it clear that al-Qaeda's internal structure is entirely hierarchical. There is no dispute about its decentralized character, which makes it unclear whether the persons believed to make up the leadership of the group would be obeyed if they ordered al-Qaeda members, for example, to treat any captured persons as required by international humanitarian law. Rather, its members must be assumed to be highly motivated as individuals and personally invested in the group attaining its ends.

Finally, al-Qaeda, outside of Iraq, does not use force to achieve conventional military objectives, such as taking and holding territory or rendering opposing military units *hors de combat*. Rather, it uses violence in order to frighten Westerners into bowing to its demands in order to escape violence, and to rally Muslims to it by demonstrating the vulnerability of Western states, by demonstrating its strength, and by claiming the mantle of a successful punisher of unbelievers who have attacked Islam. In other words, it uses violence as a form of propaganda.²⁸

These characteristics, taken together, demonstrate the difficulty of dealing with al-Qaeda. Since it is not territorially limited, it cannot be defeated by seizing this or that territory. In light of its lack of connection to any particular population grouping, it need not consider the effects of its actions on such groups and cannot be restrained by objections from members of any such group. Its ideological orientation, millennial objectives, and apparently visceral hatred of the United States mean that it cannot achieve its objectives by improving the material circumstances of its members; these characteristics also mean that it would not benefit from and would probably disdain any sort of compromise, which in turn means that it can neither be bribed into abandoning its activities nor serve as a negotiating partner. In any event, its decentralized structure raises doubts that leaders who sought compromise would necessarily be obeyed by their nominal subordinates. It has used force on a scale beyond the level any society could tolerate without some vigorous response and seeks the capacity to cause even greater levels of destruction. But the fact that its uses of force are intended to evoke particular types of reactions from different publics, rather than to accomplish definable military objectives, means that it is very difficult even to identify all potential al-Qaeda targets, let alone devise a way to defend them all. This is especially so given its demonstrated capability to carry out operations essentially all over the world. Further, since al-Qaeda attacks may well originate from within a state's territory, any measures of defense will have an impact on the citizens of the state, not simply on members of al-Qaeda.

²⁸ This observation was inspired by SMITH, *supra* note 22, especially at 167–68 and 267–305.

What does all this suggest as to the proper label to apply to al-Qaeda? That question will be addressed in the next Part.

V. FINDING A LEGAL LABEL FOR AL-QAEDA

The first point to be made about categorizing al-Qaeda is that its signature operations do not fit neatly into existing categories of the law of war. Those categories turn on the concept of “armed conflict.” Thus, the four Geneva Conventions are focused primarily, and Protocol I exclusively, on international armed conflicts.²⁹ The Geneva Conventions also impose some limitations on behavior in armed conflicts “not of an international character.”³⁰ None of these legal instruments define armed conflict, but the term has been the subject of considerable analysis.

Thus, the International Criminal Tribunal for the Former Yugoslavia held in *Prosecutor v. Tadić*³¹ that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”³² That court went on to hold that the fighting in the former Yugoslavia commencing in 1991 and continuing into 1995 was an armed conflict because it involved “protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups.”³³

Similarly, the Inter-American Commission on Human Rights concluded, in *Juan Carlos Abella*,³⁴

[T]he concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other. . . . Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. . . . Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It

²⁹ Geneva I, *supra* note 8, art. 2; Geneva II, *supra* note 8, art. 2; Geneva III, *supra* note 8, art. 2; Geneva IV, *supra* note 8, art. 2, Protocol I, *supra* note 8, art. 1.

³⁰ Geneva I, *supra* note 8, art. 3; Geneva II, *supra* note 8, art. 3; Geneva III, *supra* note 8, art. 3; Geneva IV, *supra* note 8, art. 3.

³¹ *Prosecutor v. Tadić*, Case No. IT-94-I-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

³² *Id.*

³³ *Id.*

³⁴ *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V/II.95, doc. 7 rev. 271 (1997).

is important to understand that application of Common Article 3 does *not* require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory.³⁵

The Commission went on to conclude that a thirty-hour episode commencing with an attempt by a forty-two-person armed group to take control of a military installation in La Tablada, Argentina, and ending with the forcible recapture of the installation by security forces,³⁶ amounted to an armed conflict. In particular, the Commission observed:

What differentiates the events at the La Tablada base from [internal disturbances] are the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question. More particularly, the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective - a military base. The officer in charge of the La Tablada base sought, as was his duty, to repulse the attackers, and President Alfonsín, exercising his constitutional authority as Commander-in-Chief of the armed forces, ordered that military action be taken to recapture the base and subdue the attackers.³⁷

Again, Professor Christopher Greenwood has argued that al-Qaeda *cannot* engage in armed conflict because it is not a state, because its members cannot lawfully engage in armed conflict and, most relevant for this discussion, because it lacks the practical capacity to engage in armed conflict.³⁸ He asserts,

[T]o say that [al-Qaeda has] a capacity to murder or destroy is not the same thing as saying that they have the capacity to wage war. Controlling no territory, having no courts or legal system and no armed forces, their behaviour is a far cry from anything resembling the conduct of war by a state.³⁹

There is thus considerable authority that the term armed conflict refers to something like organized combat between two armed groups. According to this understanding of the term, a group cannot be understood to be engaged in armed conflict merely because it uses violence for political ends. A group is engaged in armed conflict only if those of its members who engage in violence organize themselves into something resembling military units and direct their violence, at least in part, at their opponents' similarly organized groups.

³⁵ *Id.* ¶ 152.

³⁶ *Id.* ¶ 1.

³⁷ *Id.* ¶ 155.

³⁸ GREENWOOD, *War, Terrorism and International Law*, *supra* note 9, at 430–31.

³⁹ *Id.* at 431.

As noted above, however, al-Qaeda does not conduct its operations in this manner outside Afghanistan and Iraq.⁴⁰ Its operations outside those combat zones very often involve suicide attacks on civilian targets; indeed, 97% of the deaths and 93% of the injuries it has inflicted have resulted from such attacks.⁴¹ Its operations away from Afghanistan and Iraq thus do not involve anything resembling conventional combat. Its activity, then, does not amount to armed conflict within the meaning of the Geneva Conventions and their protocols, and thus is not addressed by these legal instruments.

Professor Jinks has reached the opposite conclusion.⁴² He argues that the criteria relevant for determining whether a particular action should be deemed an armed conflict are: the intensity of the violence in question; whether the group inflicting the violence has the resources and organizational sophistication to engage in sustained hostilities; and how the initiator of the action, the state victim of the action, third states, and international organizations characterize the action.⁴³ He also gives weight to the duration of the conflict, asserting that a conflict lasting “only a few months” would satisfy any requirement that an armed conflict be “protracted,” and that the conflict between the United States and al-Qaeda had lasted at least from September 11, 2001, until the date of his writing (presumably no earlier than some point in 2002).⁴⁴ Regarding the September 11 attacks, he observes that they were very violent, killing approximately 3,000 people and causing extensive economic losses, that al-Qaeda is clearly a well-organized and well-funded group, and that both the United States and al-Qaeda characterize their relationship as “war.”⁴⁵ He also observes that the United Nations, NATO, and the OAS all took actions, a necessary predicate of which was that the events of September 11 constituted an “armed attack.”⁴⁶

Professor Jinks’s argument regarding the September 11 attacks is convincing. However, the issue is not whether the attacks on that day amounted to armed conflict, but whether the period from September 11 through the present can properly be labeled the same way with respect to activity taking place away from Iraq and Afghanistan. There are two reasons to doubt Professor Jinks’s conclusion on this point.

First, no action by al-Qaeda since September 11, 2001, and away from the two zones of open combat, has approached the intensity of the violence on that day.⁴⁷ Professor Jinks did not suggest that the bombings

⁴⁰ See *supra* Part IV.

⁴¹ See MIPT/TKB, *supra* note 27 (searching for suicide attacks by al-Qaeda).

⁴² Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1 (2003).

⁴³ *Id.* at 25–33.

⁴⁴ *Id.* at 28–29 & n.189.

⁴⁵ *Id.* at 33–35, 37–38.

⁴⁶ *Id.* at 35–37.

⁴⁷ See MIPT/TKB, *supra* note 27 (follow “by Group” hyperlink, then follow “al-Qaeda” hyperlink). Note that this list does not include some incidents for which

of the American embassies in East Africa in 1998 were large enough to amount to an armed conflict,⁴⁸ and that incident involved as many fatalities as the worst of al-Qaeda's post-September 11 attacks.⁴⁹ If those attacks were not sufficiently intense to be an armed conflict, then the post-September 11 attacks would likewise not suffice in themselves. Professor Jinks's argument therefore requires reading the term "armed conflict" to cover all violent acts by al-Qaeda subsequent to September 11 because of the scale of that one attack. This seems counter-intuitive. At some point, an armed conflict ends. If the nature of the conflict is such that a formal end to hostilities cannot be expected, then the ending of the conflict can be determined only by the decline in levels of violence. It seems unlikely that absolute peace must obtain before the levels of violence should be considered too low to justify the armed conflict designation—but if an armed conflict can end despite the persistence of some violence, one must conclude that the armed conflict must be deemed to have ended once violence drops below some minimum level and does not exceed that level for some extended period of time. As of this writing, it has been approximately five and one-half years since al-Qaeda launched an attack so intense that it clearly exceeded the armed conflict threshold. This circumstance at least raises some question whether any armed conflict that began on September 11 persists with respect to al-Qaeda activities away from Iraq and Afghanistan.

There is a second reason to doubt whether al-Qaeda's activities outside combat zones amount to armed conflict, though it is more abstract and therefore more doubtful. The argument is that all elements of the Geneva Conventions and Protocols assume that armed conflict is an activity in which it is possible for combatants to comply with international humanitarian law, at least with respect to methods of using violence and respect for legal limits on targeting. Obviously, all combatants do not comply with the law, but presumably there is nothing

there is some reason to believe al-Qaeda was responsible, e.g., the bombings in London on July 7, 2005, *see* Alan Cowell, *British Police Arrest 3 in Connection with 2005 Bombings*, N.Y. TIMES, Mar. 23, 2007, at A3; the scale of these incidents, however, is comparable to that of the scale of incidents attributed to al-Qaeda, *see* MIPT/TKB, *supra* note 27 (follow "Abu Hafs al-Masri Brigade" hyperlink; then follow "Abu Hafs al-Masri Brigade and Secret Organization of al-Qaeda in Europe attacked Transportation target (July 7, 2005, United Kingdom)" hyperlink).

⁴⁸ Jinks, *supra* note 42, at 35.

⁴⁹ The attacks in East Africa took approximately 220 lives. *See* MIPT/TKB, *supra* note 27 (follow "al-Qaeda" hyperlink; then follow "al-Qaeda attacked Diplomatic target (Aug. 7, 1998, Kenya)" hyperlink under "Incidents" section). No incidents attributed to al-Qaeda since September 11, 2001, (including the July 7, 2005 bombings in London, al-Qaeda responsibility for which has not been conclusively established) have inflicted more fatalities, *see id.* (follow "by Group" hyperlink; then follow "32" hyperlink next to "al-Qaeda"); *see also id.* (follow "Abu Hafs al-Masri Brigade" hyperlink; then follow "Abu Hafs al-Masri Brigade and Secret Organization of al-Qaeda in Europe attacked Transportation target (July 7, 2005, United Kingdom)" hyperlink).

about the nature of their activity that would preclude compliance. Al-Qaeda, on the other hand, cannot comply with international humanitarian law and carry out the strategy it has adopted. Most obviously, al-Qaeda's frequent targeting of civilians violates Articles 48 and 51 of Protocol I, provisions which Greenwood has argued codify customary international law (except, arguably, Articles 51(4)(a)-(c) and 51(5)(a)).⁵⁰ Al-Qaeda's use of suicide attacks, furthermore, necessarily requires the bomber to pretend to be a civilian and to conceal his weapon, and actions of this sort surely amount to "perfidy" within the meaning of Article 37 of Protocol I;⁵¹ Greenwood argues that this provision also codifies customary law.⁵² But the use of suicide attacks directed at civilian targets is not merely a practice which al-Qaeda could abandon at will. On the contrary, if its strategy for obtaining its objectives is to terrify Western populations into submission, it must use the methods it has previously employed. It is hard to imagine how it could frighten populations if it ceased its attacks on soft targets, and it is hard to see how such attacks can be lawful in themselves or carried out other than through the use of perfidious means. If that is so, however, al-Qaeda's basic principles of operation are fundamentally inconsistent with international humanitarian law. If armed conflicts are those in which it is possible to comply with humanitarian law, as argued above, an organization that adopts the strategy al-Qaeda has chosen is not engaging in armed conflict.

As noted above,⁵³ the basic treaties governing international humanitarian law apply in cases of armed conflict. If, as just argued, al-Qaeda's operations outside combat zones do not qualify as armed conflict, are states contending against al-Qaeda unable to rely on the privileges conferred by the law of war? Certainly, some have taken this position. Dworkin, for example, has argued that international human rights law would control in such a circumstance.⁵⁴ This conclusion is not obvious, however.

In the first place, at least with respect to the United States, the only relevant treaty would be the ICCPR.⁵⁵ That treaty governs the behavior of a party to it only with respect to individuals "within its territory and subject to its jurisdiction."⁵⁶ The Human Rights Committee, established by the ICCPR to monitor implementation of the treaty, has asserted that this language means that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the

⁵⁰ GREENWOOD, *1977 Protocols*, *supra* note 10, at 193–95.

⁵¹ Protocol I, *supra* note 8, art. 37.

⁵² GREENWOOD, *1977 Protocols*, *supra* note 10, at 190–91.

⁵³ See *supra* note 29 and accompanying text.

⁵⁴ Dworkin, *supra* note 1, at 65–73.

⁵⁵ ICCPR, *supra* note 4.

⁵⁶ *Id.* art. 2.1.

State Party.”⁵⁷ However, nothing in the ICCPR obliges state parties to that treaty to simply acquiesce in the Human Rights Committee’s reading of the treaty⁵⁸—a that reading obviously ignores the plain language of the treaty, which limits states’ obligations to their own territories. Further, since article 6.1 of the ICCPR forbids governments to “arbitrarily” take life, and that article is non-derogable according to article 4.2,⁵⁹ it could be applied in dealing with al-Qaeda only if arbitrariness were to be assessed on some sort of a sliding scale, as Dworkin acknowledges.⁶⁰ But how would it be possible to devise such a scale, suitable for use in a wide variety of situations where people under great pressure would be obliged to make split-second decisions? And if we are dealing with a situation in which it is very nearly impossible to imagine how to apply the ICCPR, one may question whether the ICCPR was meant to apply to that situation.

Nor is it clear that the law of war would not apply to the treatment of al-Qaeda members outside of combat zones. The history of the law of war as it has developed since the mid-nineteenth century shows that, as particular treaties have been shown by experience to be deficient in some regard, they have been replaced by treaties intended to cure the deficiency.⁶¹ The law of war is not static. As military technology changes and human beings define themselves in new ways that lead to new forms of organization for violence, the law of war must change with it or risk irrelevancy. This follows from states’ motives for going to war.

It is crucial to remember that states do not go to war in order to have the opportunity to display their fidelity to the law of war. States—particularly early-twenty-first century states with popularly elected governments—go to war in order to achieve goals that are seen as particularly crucial. To the extent that the law of war, as it exists at any given time, imposes significant barriers on a state’s ability to fulfill its most essential responsibilities—e.g., protecting its civilian population from large-scale politically motivated violence—there is considerable risk that a state almost surely will—and probably should—depart from existing conceptions of the law of war rather than fail the voters. If the law of war is not to become irrelevant in the face of changing threats, that body of law must be sufficiently flexible to depart from the letter of treaties drafted before the emergence of particular types of dangers. We must accept the possibility of gaps in the law and the necessity of filling those gaps.

⁵⁷ U.N. Human Rights Comm., *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

⁵⁸ ICCPR, *supra* note 4. Cf. U.N. Int’l Law Comm’n, *Report of the International Law Commission on the Work of Its Forty-Ninth Session*, U.N. GAOR 52d Sess., Supp. No. 10, ¶ 157, at 127, U.N. Doc. A/52/10 (May 12–July 18, 1997).

⁵⁹ ICCPR, *supra* note 4, arts. 4(2), 6(1).

⁶⁰ Dworkin, *supra* note 1, at 69–70.

⁶¹ UK Manual, *supra* note 23, at 7–19.

In this case, we see that existing treaties purport to permit states to resort to the privileges provided by the law of war only if a state finds itself in an armed conflict of either an international or a non-international character. Implicit in this arrangement is the assumption that only armed conflict—that is, uses of violence analogous to conventional combat—presents a state with a problem whose solution demands the freedom of action provided by the law of war. The September 11 attacks have falsified that assumption. Clearly, states can face very serious risks of politically motivated violence quite apart from an armed conflict situation. But the question then arises, if international humanitarian law were to be extended to cover cases beyond those it now reaches, how ought its area of application be defined? Since such an extension would permit otherwise unlawful uses of violence, some definition is necessary, but what would it be?

An extension of privileges developed in the context of inter-state war to other kinds of conflict is most easily justified if these other types of conflict pose risks to states comparable to those of war. As discussed above,⁶² interstate war involves actions taken against an entity by a second entity in order to coerce the first entity to conform to the wishes of the second entity. The entities engaging and facing these coercive efforts are states or analogous public entities, and the coercion—at least since the beginning of the twentieth century—seeks some political objective. The coercion takes the form of the infliction of high levels of violence causing significant loss of life and damage to property; all states involved not only seek to employ violence in this way but face the risk that they will be the recipients of such violence. Individual participants in war, furthermore, act as members of a group held together either by military discipline or by common commitment to an ideological goal, and therefore cannot necessarily be dissuaded from continuing their activities by appeals to self-interest. In these circumstances, a state will focus heavily on protecting itself from the acts of violence aimed at it. That is, it will seek to prevent attacks on the lives and property of its inhabitants rather than content itself with responding to attacks after the fact. And it is commonly the case that a state that is the object of some other entity's war can protect itself from the harms war can do only by resorting to war itself.

How does the threat the United States faces from al-Qaeda compare to this paradigm of war? As discussed above,⁶³ al-Qaeda's goals are purely political. Though almost surely unachievable, these goals include absolute opposition to the United States and a determination to kill as many Americans as possible. It has shown a capacity to operate throughout the world. It has on one occasion inflicted damage of a level most commonly associated with military action, and seeks the capability to regularly cause very high levels of damage. However, as also discussed

⁶² See *supra* Part III.

⁶³ See *supra* Part IV.

above, al-Qaeda has engaged in a relatively limited number of actions since it began targeting American objectives in 1993, and killed over 90% of its victims in only one day's attacks, those of September 11. Its actions since that time outside of Iraq and Afghanistan have not compared in destructiveness to the September 11 attacks.

The picture, in short, is mixed. There is no doubt that al-Qaeda seeks to do the United States tremendous harm, and has been able to do so once. Its actions since September 11, 2001, however, have been much less destructive than the attacks on that day. Surely the United States faces a degree of political enmity from al-Qaeda comparable to a level that would accompany a situation necessitating war. But does the risk it faces rise to that level?

Estimating that risk is difficult. Certainly the United States asserts that it sees itself as confronting that level of risk. According to the United States Department of State:

The al-Qaida network has many of the characteristics of a "globalized insurgency" and employs subversion, sabotage, open warfare and, of course, terrorism. It seeks weapons of mass destruction or other means to inflict massive damage on the United States, our allies and interests, and the broader international system. AQ aims to overthrow the existing world order and replace it with a reactionary, authoritarian, transnational entity. This threat will be sustained over a protracted period (decades not years) and will require a global response executed regionally, nationally, and locally.⁶⁴

Further, the United States is quite unequivocal in stating its intention to continue to take preventive violent action to deal with terrorist threats, presumably including those from al-Qaeda.⁶⁵

Further, focus on al-Qaeda's relatively limited success since September 11, 2001, must take account of the preventive measures that the United States has implemented since that date.⁶⁶ That is, the absence of al-Qaeda attacks causing thousands of casualties outside of any combat zone may not reflect so much the modesty of al-Qaeda's capabilities as the obstacles to al-Qaeda action which preventive steps have created. In other words, if the United States had not taken an *ex ante* approach to dealing with terrorism after September 11, it is possible that there would have been more successful terrorist attacks than there have been.

The question, ultimately, must be how a relatively prudent government would evaluate the risk al-Qaeda generates. While the relatively limited character of al-Qaeda's post-September 11 activity

⁶⁴ U.S. Dep't of State, *The Terrorist Enemy*, <http://www.state.gov/s/ct/enemy>.

⁶⁵ NAT'L SEC. COUNCIL, *NATIONAL STRATEGY FOR COMBATING TERRORISM* 11-12 (2006).

⁶⁶ Some examples of preventative measures are enhanced screening of air travelers, tighter controls on admission to departure areas of airports, and greater scrutiny of applicants for visas to enter the United States.

outside Iraq and Afghanistan might give pause, we do not know the reason for this “restraint” and not only can we not assume that it will continue, but must assume that al-Qaeda, all other things being equal, would prefer that it did not continue. The calculation must also take into account al-Qaeda’s objectives, its embrace of violence directed at soft targets, its demonstrated ability to carry out small-scale (and one large-scale) attacks world wide, and its desire to improve its capabilities. In light of all this, it is difficult to see how a reasonably prudent government could treat al-Qaeda as anything other than a threat whose operations must be forestalled to the extent possible—including taking advantage of opportunities to reduce al-Qaeda’s capabilities that require methods irreconcilable with the strictures of the criminal law. In short, the United States is justified in claiming the rights enjoyed by belligerent states under the law of war in acting against al-Qaeda. That is, members of the United States armed forces may lawfully kill members of al-Qaeda or take them captive without facing the restrictions imposed on dealings with persons falling under the system of criminal law.

But suppose, it might be argued, an al-Qaeda member was not on the battlefield but was encountered on the streets of, say, a city in a European state with a highly developed legal system or, for that matter, a city in the United States. Does this argument mean that shooting that person down as he feeds the pigeons would be lawful?

The answer is, as a matter of *the rights of that individual under international law*, yes. This phrasing is necessary because using violence against an individual in the context we have been addressing raises (at least) three distinct legal questions. We have been addressing one of these questions, that is, whether the individual is a lawful target of violence as a matter of international law. But the other two must be addressed as well.

One of these questions is: Does international law permit the entity using violence to do so in the place where the violence is used? If an al-Qaeda member is encountered on land outside a zone of open conflict, he necessarily will be in the territory of some state. If the state desiring to use violence is not the territorial sovereign, that state would violate the sovereignty of the sovereign by using violence in its territory without its permission. It needs no citation to establish that such a violation of sovereignty would be contrary to international law. The problem, it must be stressed, is not that some rights of the al-Qaeda member would be violated, but that the authority of the territorial sovereign would be ignored. Since this Article is concerned only with the rights of the al-Qaeda member as a matter of international law, this sovereignty problem is not addressed here, except to note that it exists and that it imposes legal restraints on the use of force quite apart from restraints flowing from the status of the person against whom violence is directed.

Another legal issue relevant to the issue of shooting al-Qaeda members on sight relates to the law of the entity seeking to use force. If that entity is a state, its internal law may impose restraints on the

authority of its security forces to use violence which are stricter than those imposed by international law. For example, during the American Civil War, the United States forces sought to comply with the laws of war as formulated by Dr. Francis Lieber,⁶⁷ even though Lieber's formulation itself assumed that application of the laws of war to rebels would be a matter of "humanity," rather than legal obligation.⁶⁸

It is thus easy to imagine legal barriers to killing al-Qaeda members engaged in innocuous activities. What is important, however, is that such barriers arise from legal rules have nothing to do with the status of the al-Qaeda member himself. His own rights under international law are no greater than those of any one participating in combat.

VI. AL-QAEDA AND THE FUTURE OF INTERNATIONAL HUMANITARIAN LAW

As noted above,⁶⁹ al-Qaeda's methods of operation are, in and of themselves, unlawful according to international humanitarian law. Some of the implications of this statement are not obvious, and are worth pondering.

First, it is important that we disabuse ourselves of the idea that al-Qaeda's methods are uniquely inhumane. During World War II, the Allies directed aerial attacks at civilians in order to lower their morale—that is, their will to continue fighting—an objective little different from that attributed to al-Qaeda. The United States, in March 1945, began a campaign of incendiary bombing of Japan, wherein little effort was made to concentrate on military targets.⁷⁰ This campaign is estimated to have killed 900,000 Japanese civilians.⁷¹ A similar campaign was directed against Germany;⁷² the British specifically intended to incinerate cities.⁷³ Allied bombing killed 305,000 German civilians.⁷⁴ Use of such methods by Western states no more than sixty-five or so years ago makes it difficult to argue that a strategy of terror can only spring from the minds of individuals wholly alien to the vast majority of human beings.

Nor can it be said that the laws of war are grounded solely on determinations of the relative inhumanity of particular methods of waging war. Among other things, self-interest plays a role. Opposition to

⁶⁷ See U.S. WAR DEP'T, GENERAL ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD (Apr. 24, 1863), reprinted in RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 45–71, 115–16 (1983) [hereinafter LIEBER CODE].

⁶⁸ See *id.* at 70–71.

⁶⁹ See *supra* Parts IV–V.

⁷⁰ ROBERT A. PAPE, BOMBING TO WIN: AIR POWER AND COERCION IN WAR 92–94, 103–04 (1996).

⁷¹ *Id.* at 104.

⁷² *Id.* at 260–62, 269–72.

⁷³ *Id.* at 269–70.

⁷⁴ *Id.* at 272.

particular weapons or methods of fighting has arisen because of their threats to social distinctions,⁷⁵ or because particular weapons or tactics were particularly helpful or harmful to some states more than to others.⁷⁶

When we label al-Qaeda's tactics unlawful, therefore, we do so with the knowledge that our own past actions, if evaluated under contemporary standards, might well be considered unlawful, and the realization that the laws of war as currently crafted reflect, to a certain extent, a calculation of the interest of those who took part in framing those laws—principally states.

Now, it has long been a given for students of international humanitarian law that "[t]he principle of equality of the belligerents underlies the law of armed conflict; in other words, as a matter of law, there can be no wars in which one side has all the rights and the other has none."⁷⁷ However, as General Smith has observed, wars of the sort we have called "conventional" are likely a thing of the past, even though the armed forces of states continue to be structured primarily to fight such wars.⁷⁸ Rather, future wars are likely to be conflicts in which purely military solutions are unlikely to be available, where the actual objective will be to influence the will of a particular population rather than to occupy ground or destroy opposing armed forces.⁷⁹ Future wars, that is, are likely to involve states on one side and non-state actors on the other.⁸⁰ And non-state actors, taking the will of the people as their objective, are more likely to employ tactics similar to those of al-Qaeda than to fight in a way that fits within existing concepts of the laws of war.

The consequence of these developments is that the principle of equality between opponents in armed conflict must come into question. To be sure, one could argue that such a development could be avoided if only non-state actors would fight according to the rules of international humanitarian law, but this argument flies in the face of the fact that acceptance of the limitations of international humanitarian law by a group like al-Qaeda amounts to abandoning any possibility of fighting at all. The issue therefore arises: Should international humanitarian law be modified to reflect the likely shape of future conflicts between adversaries who differ radically in their ability and incentive to comply with existing law?

I would argue that there should be no modification. Granted, this would mean that non-state actors such as al-Qaeda would continue to be

⁷⁵ CHRISTOPHER GREENWOOD, *The Law of Weaponry at the Start of the New Millennium*, in *ESSAYS ON WAR IN INTERNATIONAL LAW*, *supra* note 9, 223, 223–32.

⁷⁶ Posner, *supra* note 24, at 428–29.

⁷⁷ INT'L COMM. OF THE RED CROSS, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS* 19 (2003), *available at* <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5UDGKT>.

⁷⁸ SMITH, *supra* note 22, at 267–69.

⁷⁹ *Id.* at 270–79.

⁸⁰ *Id.* at 301–05.

regarded as simply beyond the pale even though their tactics reflect, at least in part, their weakness, and differ only in their smaller scale from tactics employed by Western states in World War II. Granted, the effect of a refusal to change the law of war would be that certain causes can never be advanced by force, given the likely material weakness of their adherents. But the issue cannot be some notion of abstract fairness. The conflict with al-Qaeda is not a game, and a sporting attitude is out of place. The current rules of war favor us, certainly, but also reflect values that we see as worthwhile in themselves. If those rules disfavor groups whose ends can be obtained only through attacks on people who cannot defend themselves, is that such a bad thing?

VII. CONCLUSION

This Article has argued that international law permits treating members of al-Qaeda, as far as their personal rights are concerned, as combatants on a battlefield even if they are found distant from a zone of combat, in light of the risk al-Qaeda must be assumed to pose and what I have taken to be the rationale for privileging some uses of violence in the law of war. I have also observed that future conflicts are highly likely to involve entities resembling al-Qaeda on one side and states on the other and that existing rules effectively criminalize the only tactics available to such groups. I have further argued that it is desirable that the law of war not change to reflect this situation, despite its tradition of “even-handedness” because there is no reason to accommodate such groups.

There is one last thought that seems relevant to this discussion. As many have noted,⁸¹ enforcement of the rules of war depends in part on reciprocity—states expect that their opponents will respect international humanitarian law if they do so. However, that expectation of reciprocity has not been and cannot be met in conflicts against al-Qaeda and its ilk, given their tactics. To date, as far as we know, American forces have not seen themselves as entitled to “reciprocate” by discarding international humanitarian law wholesale in their dealings with al-Qaeda, notwithstanding certain well documented cases of abuse. A question to ponder is, can this desirable state of affairs continue? As the conflict with al-Qaeda goes on, particularly if there are more spectacular terrorist attacks within the United States, will the United States persist in its attempts to, more or less, adhere to international humanitarian law? There is no concrete reason to doubt that the United States will maintain at least the ideal of fidelity to law—and yet, one may legitimately fear that one consequence of al-Qaeda’s interaction with the law of war will be the degradation of that body of law, not just by al-Qaeda, but by its adversaries.

⁸¹ See, e.g., Kenneth Anderson, *Who Owns the Rules of War?*, N.Y. TIMES, Apr. 13, 2003, § 6 (Magazine), at 38, 43; Posner, *supra* note 24, at 427–30.